INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 68

T. I. M. E., INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No. 68.—The opinion of the United States District Court for the Northern District of Texas (T. R. 23–25)[1] is unreported. The opinion of the Court of

[1] Record references in No. 68 (*T. I. M. E., Inc.*) are designated "T. R. ——", and in No. 96 (*Davidson*) are designated

Appeals for the Fifth Circuit (T. R. 29–35) is reported at 252 F. 2d 178.

No. 96.—The order of the United States District Court for the District of Columbia granting summary judgment (D. R. 8) was entered without opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (D. R. 9–17) is reported at 259 F. 2d 802.

JURISDICTION

No. 68.—The judgment of the Court of Appeals for the Fifth Circuit was entered on January 30, 1958. A timely petition for rehearing was denied on February 25, 1958. The petition for a writ of certiorari was filed on May 26, 1958, and was granted on October 13, 1958 (T. R. 37).

No. 96.—The judgment of the Court of Appeals was entered on April 24, 1958. The petition for a writ of certiorari was filed on June 11, 1958 and was granted on October 13, 1958 (D. R. 18).

The cases were consolidated by this Court's order granting certiorari (T. R. 37; D. R. 18). In both cases, the jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a suit by a motor carrier to recover charges allegedly due, which is defended by the shipper on the ground that those charges are unreason-

---

"D. R. ——". References to the briefs of petitioners T. I. M. E. and Davidson will be designated "T. Br. ——" and "D. Br. ——", respectively.

able, the court must stay its hand and refer the "reasonableness" question to the Interstate Commerce Commission.

2. Whether, following the post-payment audit of transportation bills, the Comptroller General may recoup overpayments resulting from unreasonable charges by following the procedures set forth in Section 322 of the Transportation Act of 1940.[2]

STATUTES INVOLVED

Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. 66 prior to its amendment, and as amended by P. L. 85–762 (Act of August 26, 1958), and relevant portions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*, are set forth in the Appendix, *infra*, pp. 45–50.

STATEMENT

Petitioners, motor carriers in interstate commerce, filed these two suits against the United States under the Tucker Act, 28 U. S. C. 1346 (a) (2), to recover additional sums allegedly due the carriers for transporting Government property. In both cases, the United States defended on the principal ground that the additional charges demanded were unreasonable. In both cases, the courts below directed the district courts to refer the question of reasonableness to the Interstate Commerce Commission for determination. The facts in the two cases are as follows:

No. 68.—T. I. M. E., Inc., a motor carrier operating between Oklahoma City, Oklahoma and Los Angeles,

[2] This question is presented in *No. 96* only.

California, via El Paso, Texas, transported several shipments of scientific instruments N. O. I, (not otherwise indexed) under Government bills of lading (T. R. 18). One of these shipments, which the parties agreed was illustrative and did not differ in material respects from the other shipments, originated at Tinker Air Force Base, Marion, Oklahoma (T. R. 9–10). It was transported over the lines of petitioner and a connecting carrier from that point to McClellan Air Force Base at Planehaven, California (T. R. 10).

At the time of this movement, there were on file with the Interstate Commerce Commission these unapproved tariffs to which petitioner was subject (T. R. 10):

> (1) *Through Rate from Marion, Oklahoma to Planehaven, California.*—Rocky Mountain Motor Tariff Bureau Tariff No. 5–A, M. F.-ICC No. 31, providing a double first class through rate of $10.74 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma, to Planehaven, California.
>
> (2) *Intermediate Rate from Marion, Oklahoma to El Paso, Texas.*—Southwestern Motor Freight Bureau Tariff No. 1–F, M. F.-ICC No. 141, providing a rate of $2.56 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma, to El Paso, Texas.
>
> (3) *Intermediate Rate from El Paso, Texas to Planehaven, California.*—Interstate Freight Carriers Conference Tariff No. 1–C. M. F.–ICC No. A–5, providing a rate of $4.35 per cwt. on scientific instruments N. O. I. from El Paso, Texas, to Planehaven, California.

After post-payment audit by the General Accounting Office under Section 322 of the Transportation Act

of 1940, 49 U. S. C. 66, *infra*, p. 45, the Government concluded that petitioner was entitled only to sums equal to charges computed on the basis of a combination of the intermediate rates from Marion, Oklahoma, to El Paso, Texas ($2.56), and from El Paso to Planehaven, California ($4.35), *i. e.*, $6.91 per cwt. T. I. M. E. claimed, however, that the considerably higher through rate of $10.74 per cwt. was properly applicable as a matter of tariff construction.

T. I. M. E. filed this action in the United States District Court for the Northern District of Texas to collect the balance allegedly due it (T. R. 1–4.)[3] In answer, the Government contended that the applicable rate was a combination of the intermediate rates. It further urged that, if the court should determine the higher through rate to be applicable, the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness of that rate as applied (T. R. 11–12).

The case was submitted upon a stipulation which set forth the facts outlined above (T. R. 9–14). On

---

[3] T. I. M. E. claimed that the correct charges for the twenty shipments of scientific instruments totalled $20,151.88 (T. R. 16). The net payment by the Government after post-audit was $5,737.06, leaving a balance on T. I. M. E.'s claims of $14,414.82 (T. R. 3, 16). T. I. M. E. admitted that it owed the United States $16,277.89 on certain overcharges on other shipments, but claimed that the United States had wrongfully deducted from bills otherwise lawfully due an additional amount of $2,242.58 (T. R. 4). Thus, the total claim by T. I. M. E. in the district court was $16,657.40 less the admitted overcharges to the United States of $16,277.89, leaving a balance of $379.51 (T. R. 4).

June 30, 1956, the district court ruled that the through rate was applicable to the shipment of scientific instruments (T. R. 19–21). On July 18, 1956, the Government moved to hold the entry of judgment in abeyance to enable it to apply within sixty days to the Interstate Commerce Commission for a determination of the reasonableness of the through rate as so applied (T. R. 21–23). On December 29, 1956, the court denied this motion on the ground that the Commission does not have jurisdiction to review the reasonableness of rates charged on past shipments by motor carriers (T. R. 23–25). On March 5, 1957, judgment was entered for petitioner on its claims in the amount of $14,414.82 (*i. e.*, the difference between the through rate and the aggregate of the intermediate rates) (T. R. 25–26).[4]

The Government appealed to the Court of Appeals for the Fifth Circuit, urging that the district court had erred in refusing to refer the issue of the reasonableness of the through rate to the Interstate Commerce Commission (T. R. 27). The Court of Appeals reversed and remanded with directions to grant the Government's motion to hold judgment in abeyance in order to give the Government an opportunity to obtain a determination from the Interstate Commerce Commission as to the reasonableness of the through rate as applied (T. R. 35). The court held, citing *United States* v. *Western Pacific R. Co.*, 352 U. S.

[4] Because a larger judgment was entered on the Government's counterclaims ($16,942.03), the United States obtained a net recovery (T. R. 26).

59, 72, and *United States* v. *Chesapeake & Ohio R. Co.*, 352 U. S. 77, 81, that the Commission's lack of power to award reparations to shippers by motor carrier does not detract from its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in a district court (T. R. 29-35).

No. 96. On or about May 29, 1952, Davidson Transfer and Storage, Inc., transported four shipments on Government bills of lading from Poughkeepsie, New York, to Bellbluff, Virginia (D. R. 2-3). Thereafter, it billed the Government for this transportation on the basis of unapproved tariff rates which it then had on file with the Interstate Commerce Commission. These rates included a surcharge which was added to the regular rates assessed on all shipments carried to, from, through, or between points in the State of New York (D. R. 3). The ostensible purpose of the surcharge was to recoup the cost to motor carriers of a ton-mile truck tax levied by New York for the privilege of operating motor vehicles on its highways.

As required by Section 322 of the Transportation Act of 1940, *infra*, p. 45, petitioner's bills were paid by the Government as rendered, without first being audited by the General Accounting Office (D. R. 3). Upon the post-payment audit contemplated by Section 322, however, the General Accounting Office disallowed that portion of the payments which represented the surcharge. The basis of this disallowance was that on July 20, 1953, following an investigation which had been initiated in 1951, the Interstate

Commerce Commission had determined the surcharge to be unjust and unreasonable, and had ordered petitioner and other motor carriers to cancel that portion of their filed rates which reflected it. *Surcharges, New York State,* 62 M. C. C. 117 (D. R. 3).[5]

Under protest, petitioner refunded the disallowed portion of the payments (totaling $18.34) (D. R. 3–4). It then instituted this suit against the United States in the United States District Court for the District of Columbia to recover the refund (D. R. 2–5). A number of other carriers with similar claims against the Government were permitted to intervene. Both petitioner and the Government filed motions for summary judgment (D. R. 7–8). The district court, without opinion, granted petitioner's motion and denied that of the Government (D. R. 8).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that the United States could defend against petitioner's claim on the ground that the surcharge was unreasonable (D. R. 9–17). It pointed to the common law right of a shipper by motor carrier to be free from the exaction of an unreasonable rate, and held that the common law remedy for enforcement of this right was expressly preserved by the savings clause in Section 216 (j) of the Interstate Commerce Act (49 U. S. C.

[5] Petitioner's tariff, including the New York surcharge, was filed on October 8, 1951: its operation was suspended for the maximum period allowed by statute pending inquiry by the Commission, but it went into effect on May 8, 1952, before the Commission's investigation was completed (62 M. C. C. 117).

316 (j)). Concluding that it was not clear from the *Surcharges, New York State* case, *supra,* whether the Commission regarded the surcharge as having been unreasonable when the shipments here involved were made, the Court of Appeals remanded to the district court with instructions to refer that question to the Commission as a matter within its primary jurisdiction (D. R. 17).

SUMMARY OF ARGUMENT

I

In these suits for transportation charges filed by the petitioner motor carriers against the United States under the Tucker Act, the courts below have ruled that the United States may defend on the ground that the charges are unjust and unreasonable. Applying the primary jurisdiction doctrine, both appellate courts have ordered the district courts to refer the question of unreasonableness to the Interstate Commerce Commission.

Petitioners argue, however, that, despite the express prohibition against unreasonable charges in the Motor Carriers Act, they may retain all unreasonable charges already exacted; that the Interstate Commerce Commission has no authority to investigate or to make findings as to such charges on past shipments; and that the courts cannot refer the economic issue of unreasonableness to the Commission, even though it is raised as a claim or defense in an action in which the court has jurisdiction of the parties and the subject matter.

Petitioners' contentions are grounded principally on the fact that the Motor Carriers Act does not nfer authority on the Commission to award reparans. In our view, absence of reparations authority the Commission does not operate to permit motor rriers to collect or retain unreasonable charges—arges which are unlawful both at common law and der the Motor Carriers Act.

A. The United States, as a shipper, has a judicially forceable right against the exaction by motor carrs of unreasonable charges. The Motor Carriers t itself enjoins motor carriers to charge reasonable es. Section 216 (b), (d), 49 U. S. C. 316 (b), (d), lifies, for purposes of federal regulation, the ancient ty of a common carrier to charge just and reasone rates to all shippers. Thus, although the Motor rriers Act, like the Interstate Commerce Act, Part I, made the tariff rates filed by a carrier the al rates, these rates are *lawful* only when they meet criterion of reasonableness adopted from the comn law. Breach of a statutory duty normally imes the existence of a judicial remedy. *Texas and w Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 548. d absence of affirmative power in the Commission award reparations is certainly no bar to a district rt remedy. *United States* v. *Western Pacific R.*, 352 U. S. 59.

Montana-Dakota Utilities Co. v. *Northwestern Pub-Service Co.*, 341 U. S. 246, is plainly distinguish-. This Court found that Congress, when it end the Federal Power Act, "deliberately" confined

the Power Commission to regulation of future rates. 341 U. S. at 258.

B. If the Interstate Commerce Act does not create its own remedy against motor carriers who charge unreasonable rates, then the remedy which existed at common law survived by operation of Section 216 (j) of the Motor Carriers Act (49 U. S. C. 316 (j)). While the courts cannot, as at common law, determine the issue of reasonableness, they can apply the common law remedy to the economic facts which have been found by the Commission. Uniformity of regulation is achieved by reference of the economic issue of reasonableness to the expert agency.

C. The Commission has authority to make findings as to the lawfulness of motor carriers rates charged on past shipments. This power does not depend upon authority to award reparations; it derives from the Commission's general powers to investigate any failure by a motor carrier to comply with the provisions of the Act (Sec. 204 (c), 49 U. S. C. 304 (c)) and from the express provisions requiring motor carriers to charge just and reasonable rates (Sec. 216 (b), (d), 49 U. S. C. 316 (b), (d)). The Commission has consistently adhered to this view in adjudicating disputes between shippers and motor carriers for more than fourteen years (*Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337; *United States* v. *Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87), and Congress has been so advised on repeated occasions.

492798—59——3

Since a judicial remedy against a carrier charging unreasonable rates is available to shippers, and since the Interstate Commerce Commission may make findings as to the reasonableness of past rates, the question of reasonableness, as an issue of economic fact relevant to the cause of action, may be referred to the Commission for resolution. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* is once again distinguishable. In *Montana-Dakota,* this Court declined to order a suit held in abeyance pending a determination of the reasonableness of electric power rates by the Power Commission. But it did so because there was no federally cognizable cause of action before the court. In the instant cases, the district courts had jurisdiction of the parties and the subject matter, a jurisdiction which petitioners themselves invoked. As an incident to the exercise of this jurisdiction, the issue of reasonableness may be referred to the Commission for the practical purpose of obtaining an expert appraisal of the economic facts upon which the judicial remedy depends. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481. Thus, these suits have been ordered held in the district court, pending resolution of the economic question, because they are cases in which the court alone has power to grant the relief sought. Cf. *Far East Conference* v. *United States,* 342 U. S. 570, 576–577.

II

Section 322 of the Transportation Act of 1940 authorized the General Accounting Office to deduct

from bills subsequently rendered all "overpayments" made to common carriers. Davidson argues that "overpayments" should be equated with "overcharges"—which is elsewhere defined, for other and distinct purposes, as meaning charges in excess of the filed tariff rate.

But there is no reason to accord to the term "overpayments" the more restrictive meaning sometimes associated with "overcharges". Congress, when it enacted Section 322, proposed to reserve fully the Government's right to make itself whole by withholding. *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253. And more recent amendment of Section 322 (in 1958) confirms Congressional awareness of the difference between the two terms.

ARGUMENT

In the decisions challenged here by petitioners, the Court of Appeals for the Fifth Circuit (in (*T. I. M. E.*) and the Court of Appeals for the District of Columbia Circuit (in *Davidson*) held that the United States has the right to resist a suit for freight charges by common carriers by motor vehicle, on the ground that the charges demanded are unreasonable. Both courts further recognized, in accordance with the primary jurisdiction doctrine enunciated in *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and recently restated in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, that the defense of unreasonableness cannot be sustained on the merits unless the Interstate Commerce Commission, the agency charged by Congress with exclusive supervision of rates for

interstate motor carriage, first finds that the charges in question were unreasonable. Accordingly, both courts have ordered the suits held in abeyance until the Commission has passed upon the issue of reasonableness.[6]

Petitioners deny the power of the courts to allow the defense of unreasonableness; deny that the Interstate Commerce Commission has any authority to make findings as to past charges; and deny that the courts may hold the case in abeyance while the issue of reasonableness is referred to the Commission. These contentions are based almost exclusively on the fact that the Motor Carriers Act of 1935, 49 Stat. 543, as amended, does not specifically authorize the Interstate Commerce Commission to grant reparations to shippers who are injured by violations of the Act.

But the absence of such an explicitly formulated sanction does not, we submit, justify exaction by the carrier of excessive and unreasonable charges. As we point out below, the Act itself, in mandatory terms, states the affirmative duty of interstate common carriers by motor vehicle to charge just and reasonable

[6] In both cases, a showing was made that the defense of unreasonableness of the rates was substantial. In *T. I. M. E.*, the Government's defense was supported by I. C. C. decisions holding that through motor carrier rates which exceed the aggregate of intermediate rates are *prima facie* unlawful, *e. g. Stokely Foods, Inc.* v. *Foster Freight Lines, Inc.*, 62 M. C. C. 179; *Kingan and Co.* v. *Olson Transportation Co.*, 32 M. C. C. 10. In *Davidson*, it was supported by the I. C. C.'s decision that inclusion of the New York surcharge in rates for shipments through that state was unreasonable. *Surcharges, New York State*, 62 M. C. C. 117.

rates.[7] Since this declaration of carrier obligation confirmed the established common law rule, there is certainly no reason to imply that it destroyed the remedies for illegal exactions. The Commission has long acted on the assumption that those remedies exist, and it has regularly exercised the power to make findings as to the reasonableness of past rates in aid of judicial proceedings.

I

THE UNITED STATES AS A SHIPPER HAS A JUDICIALLY ENFORCEABLE RIGHT AGAINST THE EXACTION BY MOTOR CARRIERS OF UNREASONABLE CHARGES

A. THE INTERSTATE COMMERCE ACT IMPOSES A JUDICIALLY ENFORCEABLE DUTY ON MOTOR CARRIERS TO CHARGE REASONABLE RATES

1. *The Common Law Background of the Interstate Commerce Act.*—When it undertook the regulation of interstate motor carriage, Congress was unequivocal in its command that the charges of carriers should be just and reasonable. In Section 216 (b) [49 U. S. C. 316 (b)] the Motor Carrier Act provided:

> It shall be the duty of every common carrier of property by motor vehicle * * * to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto * * *.

---

[7] We note that in the *Davidson* case the rates involved were challenged at filing, were suspended by the Commission, and ultimately were held to be unreasonable. Davidson is thus seeking to retain unreasonable charges it succeeded in collecting between expiration of the suspension and the Commission's final order.

This duty was reenforced by the express declaration in Section 216 (d) [49 U. S. C. 316 (d)] that:

> All charges made for any service rendered or to be rendered by any motor carrier by motor vehicle engaged in interstate or foreign commerce * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *

The duty imposed by the language quoted above was not a new obligation. It was a codification, for purposes of federal regulation, of a rule known to the common law from the earliest days. 2 Hutchinson, *Law of Carriers* § 805 (3d ed. 1906); 2 Kent's *Commentaries* *599–600, n. (a) (14th ed.). See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 262. At common law it was a tort for a common carrier to demand an unreasonable charge for its customary services. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660; *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. Beyond this, the common law's requirements were not extensive. In fact, they amounted to little more than that the carrier should furnish transportation, within the limits of its facilities, to all persons who applied, and that the charges should be reasonable. *Interstate Commerce Commission* v. *B. & O. Railroad*, 145 U. S. 263, 275.

The duty thus imposed on common carriers by the common law, of course, applied to interstate as well as to intrastate carriage. *Western Union Telegraph Co.*

v. *Call Publishing Co.*, 181 U. S. 92, 102.[5] This is also demonstrated by a series of railroad cases under the Interstate Commerce Act which involved questions as to the relation between the Act and previously existing common law remedies. Thus, the power to determine the reasonableness of charges, which had long been regarded as "eminently a question for judicial investigation" (*Chicago, Milwaukee & St. Paul Rwy. Co.* v. *Minnesota*, 134 U. S. 418, 458), was held to have been taken from the courts and vested exclusively in the Interstate Commerce Commission. *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, *supra*, at 443; see *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 384, n. 9. But the common law duty of interstate carriers survived in a wide variety of circumstances not covered by the Act. See *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 129–30.

Assignment to the Commission of exclusive power to determine the reasonableness of rates was not held to be a disavowal by Congress of the common law. Rather, it was recognized for what it was, an incorporation into the statute of the common law's obliga-

[5] The decision in the *Western Union* case, *supra*, was founded upon the assumption that the federal courts applied the same general body of common law as did the states, and that they could find the content of this common law independently of the decisions of the states. This view has been modified, as to cases arising under the diversity jurisdiction, by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. *Western Union's* holding that a carrier in interstate commerce is subject to common law liability, absent federal legislation to the contrary, remains unimpaired, however.

tions upon common carriers to make all their charges just and reasonable. *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 167 U. S. 479, 505–6. To be sure, the Interstate Commerce Act made the rates filed in the carrier's tariffs the legal rates for purposes of the statute, but "Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable." *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 383–4.

Congress was aware of these principles when it undertook to regulate interstate motor carriers and must be deemed to have acted in light of them when it enacted Part II of the Interstate Commerce Act. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 545; *Shapiro* v. *United States*, 335 U. S. 1, 16; *Helvering* v. *Winmill*, 305 U. S. 79, 82–83; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 310–315. In language almost identical to that used in Part I (Sec. 6 (7), 49 U. S. C. 6 (7)), Congress made the filed tariff rate the only legal rate which motor carriers could claim.[a] Section 217 (b), 49 U. S. C. 317 (b). Again, in language almost identical to that used in Part I (Sec. 1 (5) (6), 49 U. S. C. 1 (5) (6)), it declared unreasonable charges to be unlawful and

[a] The United States, as a shipper, may, of course, be eligible for rates lower than the filed tariff rates. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 76, note 20; *Western Pac. R. R. Co.* v. *United States*, 255 U. S. 349, 355–356.

made it the duty of motor carriers to establish reasonable rates. Sec. 216 (a) (d), 49 U. S. C. 316 (a) (d). Thus, just as in Part I, Congress incorporated the common law duty to charge reasonable rates and converted it into a federal cause of action. *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370.

2. *The Absence of Remedial Provisions.*—Absence of specific remedial provisions in Part II does not derogate from this conclusion. As has recently been emphasized, the existence of a statutory right implies the existence of an effective remedy unless there is strong evidence to the contrary. *Leedom* v. *Kyne*, No. 14, October Term, 1958 (decided December 15, 1958); *Harmon* v. *Brucker*, 355 U. S. 579; *Texas and New Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 548. Thus, in a recent application of the *Railway Clerks* case, *supra*, this Court said (*Leedom* v. *Kyne*, supra):

> In *Texas & New Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 549, it was contended that, because no remedy had been expressly given for redress of the congressionally-created right in suit, the Act conferred "merely an abstract right which was not intended to be enforced by legal proceedings." *Id.*, at 558. This Court rejected that contention. It said: "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded * * *. The definite prohibition which Congress inserted in the Act cannot therefore be overridden in the view

> that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Id.*, at 568, 569. * * *

Nonetheless, like the carrier in *Railway Clerks,* petitioners are contending that a peremptory statutory command—that unreasonable rates are unlawful and prohibited—is a mere abstract declaration. Here, indeed, the need for a remedy is even stronger than in *Railway Clerks,* for the statute is an affirmation of a previously existing common law duty not to exact unreasonable charges. *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.,* 284 U. S. 370.

The remedy implied by the duty not to charge unreasonable rates does not turn on the presence or absence of authority in the Commission to award reparations against a carrier. Even the cause of action to enforce reparations awards by the Commission under Part I of the Act does not derive from the Commission's power to award reparations, but from the substantive duty imposed by the Act. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U. S. 654, 660. The reparations award merely creates a rebuttable presumption of liability in a specific amount. *Meeker & Co.* v. *Lehigh Valley R. R.,* 236 U. S. 412, 430.

Even where the right to affirmative recovery may be destroyed by the running of the statute of limitations (see *William Danzer Co.* v. *Gulf & S. I. R. Co.,* 268 U. S. 633, 636; *Midstate Co.* v. *Pennsylvania R. Co.,* 320 U. S. 356, 364), the defense of unlawfulness may be raised against a carrier seeking to enforce

freight charges. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59.

In *Western Pacific, supra,* three rail carriers sued the United States under the Tucker Act to recover additional charges allegedly due them for the transportation of containers filled with napalm gel. These charges had been computed at the rate specified for "incendiary bombs". The Government defended on the ground that, as a matter of tariff construction, the lower rate specified for gasoline in steel drums applied, and, alternatively, that, if the higher rate governed, it was unreasonable as applied and the issue of reasonableness should be referred to the Interstate Commerce Commission. Granting summary judgment to the carriers, the Court of Claims resolved the tariff construction question adversely to the Government and concluded that a reference to the Commission of the issue of reasonableness was barred because of expiration of the two-year period during which the Government could have sought affirmative relief in an independent reparation proceeding against Western Pacific before the Commission. In reversing, this Court held that the absence of authority in the Commission to entertain such a reparation proceeding and to award affirmative relief to the Government did not abrogate the Government's right to interpose the defense of unreasonableness or justify the lower court's refusal to refer to the Commission the administrative question raised by that defense (352 U. S. at 71–74):

> We may assume, without deciding, that the Government would have been barred by § 16 (3)

from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. * * *

* * * * *

It is argued that this Court has construed § 16 (3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. Reliance is placed upon *A. J. Phillips Co.* v. *Grand Trunk R. Co.*, 236 U. S. 662; *William Danzer & Co.* v. *Gulf & S. I. R. Co.*, 268 U. S. 633; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356. But these cases all dealt with affirmative claims for the recovery of transportation charges, and not with referrals incident to suits which were originally brought in time. The teaching of the *Midstate* case, for instance, is that the running of the statute destroys the *right* to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties. But here the Government is not asserting a right to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense. * * *

It is thus plain from *Western Pacific* that the defense of unlawfulness is fully available to a shipper in a suit to collect unreasonable freight charges. It is equally plain from *Western Pacific* that, where the shipper raises such a defense, the trial court must

stay its hand and refer the issue to the Commission, notwithstanding the lack of power in the Commission to order affirmative relief for the shipper.

3. *The Prohibition Against Unreasonable Freight Charges Is Justiciable.*—Petitioners contend that *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, forecloses the argument that the language of the Interstate Commerce Act creates a "justiciable legal right" (T. Br. pp. 12–15; D. Br. p. 23). From the premise that there is no affirmative right they leap to the conclusion that there can be no defense. But *Western Pacific* conclusively shows that absence of an affirmative right to recovery does not foreclose the right to defend. Cf. *British Transport Commission* v. *United States*, 354 U. S. 129, 142; *National Bank* v. *Republic of China*, 348 U. S. 356, 365. And petitioners' reliance on this Court's decision in *Montana-Dakota* is, in any event, misplaced.

Montana-Dakota was a suit in a federal court by one public utility electric company against another to recover past exactions of allegedly unreasonable charges. Since there was no diversity of citizenship between the parties, and thus jurisdiction in the district court would have been lacking had the suit been brought to enforce an asserted common law right, the plaintiff, of necessity, alleged that a right of action had been created by the Federal Power Act itself. This Court held that the declaration in that Act that unreasonable rates are unlawful did not create an enforceable right to recover unreasonable charges.

This holding was based upon two considerations: First, that the criterion for statutory reasonableness did not create a justiciable legal right (341 U. S.

at 251); and, second, that there was plain legislative history to show that Congress did not intend either court or Commission to have the power to award reparations (341 U. S. at 258).

Petitioners' heavy reliance on *Montana-Dakota* ignores the vital fact that that case turned on an interpretation of the Federal Power Act in the specific context of its regulatory purpose and in the light of its legislative history. Unlike the Interstate Commerce Act, the criterion for statutory reasonableness in the Federal Power Act was not adopted against a specific common law background; there was no established common law doctrine requiring sellers of electric power to charge reasonable rates, nor had the reasonableness of such rates been generally regarded as appropriate for judicial determination. Instead, the statute declared a new regulatory obligation previously unknown or inchoate in the law. The Interstate Commerce Act, as we have shown above, was a codification, for purposes of federal regulation, of established criteria and remedies to which common carriers had long been subject (see the discussion, *supra,* pp. 15–19). It can hardly be contended, in the light of the common law's requirements, that a common carrier's duty to charge reasonable rates is not a justiciable legal right. Furthermore, petitioners can point to nothing in the legislative history of the Motor Carriers Act which demonstrates an intent by Congress to strip shippers of their common law protection against exactions of unreasonable freight

charges.[9] Rather, it must be assumed that when a carrier has been unjustly enriched by the collection of unlawful charges, in direct violation of a statutory command that unreasonable charges not be levied, Congress intended that restitution should continue to be made to the injured party. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 347.

B. IF THE INTERSTATE COMMERCE ACT DOES NOT IMPOSE A JUDICIALLY ENFORCEABLE DUTY ON MOTOR CARRIERS TO CHARGE REASONABLE RATES, THEN THE COMMON LAW DOES.

We have shown above that the Interstate Commerce Act itself gives shippers a federal cause of action against common carriers by motor vehicle who exact unreasonable rates. If this view should not prevail, however, then we submit, in the alternative,

[9] As this Court observed in *American Trucking Assns.* v. *United States*, 344 U. S. 298, 312, Congress' primary concern when it enacted the Motor Carriers Act of 1935 was to bring order into a chaotic competitive situation in the motor carrier industry. See Sen. Rep. 482, 74th Cong., 1st Sess.; Report of the Federal Coordinator of Transportation, Senate Document No. 152, 73rd Cong., 2d Sess.; Report of the Federal Coordinator of Transportation, House Document No. 89, 74th Cong., 1st Sess. The bill's proponents hoped that regulation of rates by the Interstate Commerce Commission would raise them from the uneconomic levels at which they stood in 1935. Hearings Before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., To Amend Interstate Commerce Act, Part I, p. 64 (testimony of Federal Coordinator of Transportation Eastman). Neither the debates in the Congress, nor the Committee Reports, nor the reports of the Federal Coordinator of Transportation, reflect an intention by Congress to prevent shippers injured by unlawful rates from recovering compensation from the carrier who made tortious exactions of unreasonable charges.

that the common law remedy described above is preserved by the savings clause in Section 216 (j) of the Motor Carriers Act (49 U. S. C. 316 (j)). The clause expressly provides that nothing in Section 216 "shall be held to extinguish any remedy or right of action not inconsistent herewith". The common law rule, of course, was changed by the Act to the extent that it provided that the Commission, rather than the courts, should exercise the power theretofore exercised by the courts, of determining the reasonableness of rates. See *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 385; *Texas and Pacific R. Co* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. But the continued existence of the common law remedy is plainly consistent with the Act so long as the issue of reasonableness, which Congress has reserved for the Commission, is referred to the Commission for resolution. *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337.

Relying upon language in *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446, and *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437, petitioners argue that the shipper's traditional common law remedy was destroyed by the Interstate Commerce Act. But the court in the *Abilene Cotton Oil* case was concerned only with the question of whether shippers had a common law right to a *judicial* determination of the issue of reasonableness. It was this right, previously recognized by the courts in cases arising under the common law, which was modified by the Interstate Commerce Act in order to obtain a nationally uniform standard of

reasonableness. The remedies of the Act, however, were to "be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act" (204 U. S. at 446–7). See *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 384. Nor is *United States* v. *Interstate Commerce Commission, supra,* to the contrary. In that case, the court was concerned only with the reviewability of the Commission's findings following a shipper's election to proceed before it under Section 9. The existence of a common law remedy was not even in issue. (See also, the discussion, *infra,* p. 40.)

Petitioner Davidson argues that the existence of a common law remedy would somehow be unconstitutional, citing *Wabash, St. Louis & P. Rwy. Co.* v. *Illinois,* 118 U. S. 557. That case held no more than that the rates to be charged by common carriers for interstate traffic cannot be legislatively prescribed *by the states.* But the existence of a common law remedy in no way conflicts with the constitutional power of Congress to regulate interstate commerce, nor does it in any way impede the free flow of interstate commerce. On the contrary, in the absence of inconsistent federal regulation, the availability of common law remedies against interstate carriers for breach of their duties as common carriers has long been acknowledged. See *Arizona Grocery Co.* v. *Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370; *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Western Union Telegraph Co.* v. *Call Publish-*

ing Co., 181 U. S. 92; *Interstate Commerce Commission* v. *B. & O. Railroad*, 145 U. S. 263. With respect to interstate carriers, only obligations which in some way interfere with federal regulation or which affirmatively burden interstate commerce are barred by the Commerce Clause of the Federal Constitution.[10] Cf. *Collins* v. *American Buslines, Inc.*, 350 U. S. 528. No such interference is possible where the uniformity of regulation contemplated by the Commerce Clause is achieved by reference of the economic issue of reasonableness to the Interstate Commerce Commission.

C. THE DEFENSE OF UNREASONABLENESS WAS PROPERLY REFERRED TO THE INTERSTATE COMMERCE COMMISSION BY THE COURTS BELOW.

Under the primary jurisdiction rule of *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, the reasonableness of the rate challenged by the shipper is a matter which cannot be resolved by the courts. When a claim or defense involving this issue is raised in a case over which it has jurisdiction, the court must stay its hand and hold the case in abeyance while the matter is presented to the Commission for resolution. Both petitioners argue that this cannot be done because the Commission lacks

[10] In addition, it must be noted that the asserted constitutional issue could not arise in the present cases since the common law rights of the United States are not determined by the law of any state. *United States* v. *Standard Oil Co.*, 332 U. S. 301; *United States* v. *Allegheny County*, 322 U. S. 174; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363.

authority to make findings as to past shipments. We believe that this argument has no merit and was properly rejected by the courts below.

1. *Statutory Authority.*—The Motor Carriers Act does not contain any express grant of authority under which the Commission may award reparations, and the Commission has never asserted that it has such power. But the Commission does have express statutory authority to investigate the failure of any motor carrier to comply with any provision of the Act (Section 204 (c); 49 U. S. C. 304 (c)):

> Upon complaint in writing to the Commission by any person * * * or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part * * *.

It is a violation of the Act for any motor carrier to establish unjust and unreasonable rates (Section 216 (b); 49 U. S. C. 316 (b)) or to make unjust and unreasonable charges (Section 216 (d); 49 U. S. C. 316 (d)). When these sections are read in conjunction with Section 216 (e) (49 U. S. C. 316 (e)), which authorizes the Commission to entertain complaints alleging violations of Sections 216 and 217, the statutory foundation for the Commission's power to investigate excessive or unreasonable past charges is plain. This power does not depend upon authority to award reparations. It derives, without being spelled out in terms, from the specific regulatory powers conferred on the Commission. Cf. *American Trucking Assns.* v. *United States,* 344 U. S. 298, 312;

United States v. *Pennsylvania R. Co.*, 323 U. S. 612, 616.

2. *The Consistent View of the Interstate Commerce Commission That It Is Empowered to Make Findings as to the Reasonableness of Past Motor Carrier Charges.*—The Commission's power to inquire into the lawfulness of past charges was challenged within a few years following passage of the Motor Carriers Act. In a series of decisions between 1939 and 1942, Division 5 of the Commission held without qualification that the provisions of the Motor Carriers Act confer power on the Commission to determine whether rates charged in the past were applicable and lawful, and that the absence of reparations authority was not a bar to exercise of this authority. *W. A. Barrows Porcelain Enamel Co.* v. *Cushman Delivery,* 11 M. C. C. 365, 367; *Dixie Mercerizing Co.* v. *ET and WNC Motor Transp. Co.*, 21 M. C. C. 491, affirmed on reconsideration, 41 M. C. C. 355; *Kingan and Co.* v. *Olson Transportation Co.*, 32 M. C. C. 10. It is significant that Division 5 included among its members Commissioner Eastman, who, as Federal Coordinator of Transportation, had been one of the principal architects of the Motor Carriers Act. See Sen. Rep. 482, 74th Cong., 1st Sess.

Then in 1944, in *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, the full Commission undertook (*id.* at p. 340) a "thorough reexamination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," in order to establish "a consistent precedent for future guidance". On the basis of this

"thorough reexamination," the Commission unanimously concluded that the earlier decisions of its Division 5 were correct.

At the outset, in the *Bell Potato Chip* case, the Commission referred (*id.* at 341) to the general powers expressly conferred upon it in Sections 216 (b), (d), (e), and 204 (a) (6), (c), (d) of Part II of the Interstate Commerce Act—as well as to "those powers which, upon consideration of the act as a whole, may reasonably be deemed to be implicit in the statute." In this connection, particular emphasis was placed upon the investigative authority conferred by Section 204 (c) (*supra*, p. 29), which, the Commission noted, has no precise counterpart in Part I.

After these preliminary observations, the Commission pointed out that Congress has placed the duties and obligations of rail and motor common carriers with respect to rates and charges upon the same footing (*id.* at 341), and went on (*id.* at 341–342):

> To hold that a motor carrier which has violated any of these prescribed duties is immune to civil liability to one injured thereby while rail and water carriers similarly offending must respond in damages would be not only at variance with the fundamental rule of *ubi jus ibi remedium* but would also disregard the provisions of sections 216 (j), 217 (b), and 22, which preserve all common-law and statutory remedies. The statute, by declaring unlawful and prohibiting unreasonable and discriminatory rates, has superseded the common-law

rights but has not abrogated remedies heretofore recognized. * * *

* * * * *

The basic authority to make findings of past unlawfulness is in those provisions of part I which impose the duty upon the carrier of maintaining reasonable and nondiscriminatory rates. A like administrative jurisdiction is to be found in part II even though the procedural authority has been withheld.

The Commission then considered (*id.* at 343) the ircumstances in which its jurisdiction with respect to ast rates should be exercised:

* * * The usual purpose of invoking our jurisdiction in adversary proceedings to find past unreasonableness, unjust discrimination, or undue prejudice in motor-carrier rates is to lay the groundwork for a money judgment in a court action. Our determination of such issues in circumstances of this kind is not self executing. Unless the carriers concerned are willing to be governed by our conclusions, our action becomes merely a step preliminary to a suit in court. * * *

In circumstances such as described, it is apparent that precautions should be taken to prevent the filing of frivolous or moot complaints. Without attempting at this time to devise a precise rule, we think it pertinent to point out that, generally speaking, adversary proceedings involving past unreasonableness, unjust discrimination, or undue prejudice under part II should not be brought before us prior to the institution of a suit in court in which damages

are sought predicated upon the unlawfulness alleged in the complaint. The complaint should show that such suit has been brought within the period allowed by the applicable statute of limitations. There may be other situations in which we should exercise this jurisdiction. In this connection, it may be noted that it is a recognized practice to hold in abeyance court proceedings pending the determination by the Commission of administrative questions. *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194; *General American Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, *supra*; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U.S. 304, 314; *Southern Ry. Co.* v. *Tift*, 206 U.S. 428, 434.[11]

[11] Congress is fully aware of the doctrine of *Bell Potato Chip*, *supra*, and has not seen fit to change it. Since 1945, eight bills have been introduced in the Congress to confer reparations authority on the Commission in motor carrier cases, similar to the reparations authority conferred on the Commission in rail cases by Section 13 (1) of Part I of the Act [49 U.S.C. 13 (1)]. 79th Cong.: H.R. 4872, S. 798; 80th Cong.: H.R. 2324, H.R. 2335, and S. 1194; 83rd Cong.: S. 3707; 84th Cong.: S. 723; 85th Cong.: S. 378. In the course of hearings on such bills, the operation of the *Bell* doctrine has been fully explained. Although shippers have urged that the *Bell* remedy is cumbersome, roundabout and expensive, and that direct reparations authority should be granted the Commission, Congress has declined to change the existing remedies. See Hearings before House Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess., "To Amend the Interstate Commerce Act—Undercharges and Overcharges" (March 18, 19, 1947) pp. 17, 41, 52; Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d Sess., "Miscellaneous Amendments To The Inter-

The Commission recently reaffirmed the *Bell Potato Chip* doctrine in *United States* v. *Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87 (Docket No. MC–C–1849).[12] Thus, the body which is charged with

---

state Commerce Act (Omnibus Bill)" pp. 16, 66, 106; Hearings before Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., "Surface Transportation Ratemaking Bills" pp. 12, 49, 107, and 137. This refusal by Congress to modify the *Bell* doctrine is entitled to weight, especially in view of the searching examination of shippers' remedies against motor carriers which was made by the Committees during the hearings discussed above. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 397; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17. Cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 545.

[12] In addition to the instant cases, the theory underlying the *Bell* decision has been recognized in *New York & New Brunswick Auto Express Co.* v. *United States*, 126 F. Supp. 215 (C. Cls.) and *United States* v. *Garner*, 134 F. Supp. 16 (E. D. N. C.); *contra*, *United States* v. *Apicella*, 148 F. Supp. 457 (D. N. J.).

The Commission has exercised its power to determine the reasonableness of rates on past shipments in numerous cases. *E. g.*, *Toledo Steel Tube Co.* v. *George F. Alger Co.*, 67 M. C. C. 101; *United States Gypsum Co.* v. *Bos Freight Lines, Inc.*, 63 M. C. C. 212; *J. I. Case Co.* v. *Rock Island Transfer and Storage Co.*, 62 M. C. C. 453; *Ewald Sales & Supply Co.* v. *Truck Transport Co.*, 62 M. C. C. 59; *Arma Corp.* v. *M. & M. Transportation Co.*, 61 M. C. C. 723; *John H. Kalte* v. *Central Motor Lines, Inc.*, 61 M. C. C. 529; *Manhattan Soap Co.* v. *Supreme Motor Freight Lines, et al.*, 61 M. C. C. 430; *E. I. Du Pont de Nemours & Co.* v. *Super Service Motor Freight, Inc.*, 54 M. C. C. 481; *American Greeting Publishers, Inc.*, v. *A. C. E. Transportation Co. Inc.*, 53 M. C. C. 174; *D. E. Bolman Mercantile Co.* v. *The Santa Fe Trail Transportation Co.*, 48 M. C. C. 561; *Willard Storage Battery Co.* v. *Associated Transport, Inc.*, 48 M. C. C. 284; *United States Rubber Co.* v. *Associated Transport, Inc.*, 48 M. C. C. 6; *Southeastern Metals Co.* v. *Roadway Express, Inc.*, 47 M. C. C. 395; *Glenn L. Martin*

primary responsibility for the administration of the Interstate Commerce Act has consistently held for many years that the Act permits it to render determinations as to the lawfulness of charges on past shipments. Its carefully considered analysis is, of course, entitled to great weight. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Jackson*, 280 U. S. 183, 193; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378.

3. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., Does Not Foreclose Reference of the Issue of Reasonableness to the Commission.*—Relying upon language in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, petitioners argue that the issue of unreasonableness cannot be referred to the Commission by the district courts in which the present actions were initiated because neither court nor Commission is competent to determine the issue of economic fact—the reasonableness of rates—upon which the cause of action depends. This argument misconceives both the nature of these suits and the nature of the Commission's jurisdiction.

Both suits are actions against the United States under the Tucker Act by carriers seeking to recover charges on contracts of shipment. There is no doubt that the district court had jurisdiction of the parties

---

Co. v. *W. T. Cowan, Inc.*, 47 M. C. C. 303, 44 M. C. C. 726; *Rhea Manufacturing Co.* v. *Acme Fort Freight, Inc.*, 47 M. C. C. 280; *Metzner Stove Repair Co.* v. *Ranft*, 47 M. C. C. 151; *Victory Granite Co.* v. *Central Truck Lines, Inc.*, 44 M. C. C. 320; *Armour and Co.*, v. *Bell*, 44 M. C. C. 34.

and of the subject matter (T. R. 2, D. R. 2). As shown above, the United States had the right to defend against the action on the ground that the charges sought to be collected were unreasonable. The question of unreasonableness, admittedly not a question for the court, was referable to the Commission as a question of fact relevant to the Government's defense, which was within the special competence of the Commission. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134.

In *Montana-Dakota, supra,* this Court declined to direct the trial court to hold the case in abeyance pending a determination of the reasonableness of the electric power rates there involved by the Federal Power Commission. See 341 U. S. at 253–4. But it did so because, as we have shown above, in the circumstances of that case there was no federally cognizable cause of action before the court. The only federal claim arose from a statute which did not create a cause of action, and the court could not take cognizance of the other issues in the case because there was no diversity of citizenship between the parties. The considerations underlying that decision are obviously inapplicable here, where the issue arises in a cause over which the district court undoubtedly has jurisdiction under the Tucker Act, a jurisdiction which petitioners themselves invoked in their complaints (T. R. 2, D. R. 2).

Furthermore, absence of power to award reparations in an independent action before the Interstate

Commerce Commission does not foreclose the Commission from entertaining, on reference, proceedings to determine the reasonableness of past rates. This is conclusively shown by *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 71 (see the discussion, *supra* at pp. 21–22).

In other contexts as well, this Court has held "that in certain kinds of litigation practical considerations dictate a division of function between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts * * *." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 498. This same view underlies the decisions by the Courts of Appeals in the instant cases. Even though a shipper's remedy for unreasonable charges has been left with the courts, that remedy cannot be meaningfully and justly applied in these cases without concrete resolution by the Interstate Commerce Commission of the economic questions upon which the reasonableness of rates depends.

In cases of this nature whether a suit will be dismissed or held in abeyance pending administrative action depends entirely upon practical considerations. If the administrative agency appears to have authority to grant complete relief which is, in turn, to be followed by enforcement or other review proceedings in the courts, then the action may be dismissed. *Far East Conference* v. *United States*, 342 U. S. 570, 576–7. On the other hand, where, as here, the court alone has power to grant the relief sought, issues within the special competence of the administrative agency may

nevertheless be referred to it in order that the trial court may have the benefit of the agency's expert appraisal of the facts. *Federal Maritime Board* v. *Isbrandtsen Co., supra,* at 498–9. Cf. *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422. The answer is simply a matter of "business-like procedure." *Far East Conference* v. *United States, supra,* at 577. Since the Interstate Commerce Commission is without power to grant shippers complete relief from unlawful exactions of unreasonable rates by motor carriers, the correct course was that followed below—to stay the cases pending administrative determination.

4. *The "Exhaustion Doctrine" Is Inapplicable Here.*—T. I. M. E. sees the issue in terms of a failure to exhaust administrative remedies (T. Br. pp. 20–22). Since the Government did not obtain prospective relief from the tariff rates at the time they were filed, T. I. M. E. argues that it cannot now complain of those rates. Failure to exhaust the quasi-legislative remedy which permits shippers to attack the general, prospective operation of tariff rates does not, however, determine the availability of judicial relief as to unlawful exactions on a particular shipment. Even if it were to be so regarded, "Congress has relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier if, on post-audit, it finds that the United

States has been overcharged". *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 74.[13]

T. I. M. E.'s argument also ignores the distinction between the exhaustion and primary jurisdiction doctrines (352 U. S. at 63–64):

> * * * "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. * * *

In the Motor Carriers Act, Congress vested the Interstate Commerce Commission with "legislative" jurisdiction to prescribe future rates, and investigative jurisdiction to make findings as to rates on past shipments, but it did not confer "judicial" jurisdiction on the Commission to give reparations to shippers injured by being compelled to pay unreasonable rates on past shipments. The economic issue—reasonableness of

---

[13] As the Court also noted in *Western Pacific*, the volume of its transportation business "underscores the impossibility of requiring the Government to file anticipatory suits before the I. C. C. in every case where it thinks the carrier might later sue to recover the amount set off by the Government." 352 U. S. at 74, fn. 17.

rates—was assigned to the Commission, but the judicial remedy was, as at common law, left with the courts. Thus, these cases do not involve "exhaustion", for the claim for reparations cannot be "exhausted" in proceedings before the Interstate Commerce Commission; rather, they turn upon the "primary jurisdiction" doctrine as explained in *Western Pacific, supra.*

It is for this reason that the language of *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 437–8, stressed by petitioners, is inapplicable here. In that case, this Court indicated that a damage claim under Part I against a rail carrier cannot be initiated in a district court where the claim involves issues of reasonableness calling for exercise of the Commission's primary jurisdiction. But the court was there using the term "primary jurisdiction" not in the sense it was defined in *Western Pacific,* but in the sense that case defined "exhaustion of remedies." The court viewed the reparations authority conferred on the Commission in Part I as an exclusive system of administrative priority under which there could be no judicial action whatever until the administrative remedy had been pursued to a final order. Cf. *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, 553; *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 772; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–51. This view has no relation to the different pattern of remedies under the Motor Carriers Act.

II

SECTION 322 OF THE TRANSPORTATION ACT OF 1940 AUTHORIZES THE GENERAL ACCOUNTING OFFICE TO DEDUCT FROM BILLS SUBSEQUENTLY DUE OVERPAYMENTS OF UNREASONABLE FREIGHT CHARGES BY MOTOR CARRIERS.

Petitioner Davidson argues that, even if the United States has a judicial remedy against unreasonable charges by motor carriers, it cannot deduct these charges from bills subsequently due. It contends that the term "overpayment" in Section 322 of the Transportation Act of 1940 (*infra*, p. 45), reserving the right of the United States to deduct the amount of any overpayment to a carrier from any amount subsequently found to be due that carrier, was intended by Congress to be given the limited meaning accorded the term "overcharge", which is defined in Section 204a (5) of the Interstate Commerce Act (49 U. S. C. 304a (5)) as an amount in excess of the filed rate. Davidson refers to nothing in the legislative history of Section 322 to support this suggestion. Moreover, the definition of "overcharge" in Section 204a is in terms limited to matters arising under that section.

The terms "overcharge" and "overpayment" are sometimes used interchangeably. See *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253; *United States* v. *Western Pacific R. Co.*, 352 U. S. 59. When so used, in their broad sense, both terms refer to any type of excessive payment to a carrier, irrespective of the reason for the excessive payment. But Congress has given the term "overcharge" a technical meaning (Section 204a (5), *supra*) of much narrower scope than the term "overpayment". That it was per-

fectly aware of the distinction between the two terms is evident from the recent amendment to Section 322 contained in P. L. 85–762. In that statute, Congress struck the term "overpayment" from Section 322 and substituted the term "overcharge". Its express purpose in doing so was to foreclose "the General Accounting Office from deducting amounts resulting from any unilateral determination that applicable rates are unreasonable * * *". H. Rep. No. 2346, 85th Cong., 2d Sess., p. 5. Far from acknowledging that in pre-amendment situations the term "overpayment" was to be narrowed in meaning or scope, Section 3 of P. L. 85–762 expressly provides that "* * * [t]he provision of this Act which amends section 322 of the Transportation Act of 1940 (49 U. S. C. 66) shall apply only to transportation performed and payment made therefor subsequent to the effective date of this Act".

Thus the amendment to Section 322 clearly demonstrates that Congress was fully aware of the technical distinction between the terms "overcharge" and the term "overpayment". And the amendment would have been superfluous if "overpayment", as formerly used, meant nothing more than "overcharge".

The form in which Section 322 was recently amended is itself evidence of the special care which Congress took to avoid any redefinition of "overpayment" which might indicate a legislative interpretation that it formerly meant nothing more than "overcharge". It had been suggested to the House Committee considering the bills (H. R. 8742 and S. 377) which became P. L. 85–762 that, instead of substitut-

ing "overpayment" for "overcharge", the term "overpayment" should be redefined to accord with Section 204a. Pointing to the fact that carriers were asserting in pending litigation that the two terms were synonymous, the Comptroller General vigorously opposed this suggestion, lest its adoption should affect the pending law suits. The Comptroller General urged, instead, that the proposed amendment substitute "overcharge" for "overpayment", and then define "overcharge" specifically. His recommendations were incorporated into the bill as a Committee amendment. See H. Rep. No. 2346, 85th Cong., 2d Sess., on H. R. 8742, pp. 5, 12, 17–18. The bill passed both Houses in this form. 104 Cong. Rec. 14881, 14889 (daily ed.). This legislative history completely refutes any suggestion that Congress viewed "overpayment", as used originally in Section 322, as having the limited meaning later given the term "overcharge".

Finally, petitioner's contention ignores the basic purpose of original Section 322. At this Court stated in *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, Section 322 conferred the benefit of prompt payment upon the carrier, but preserved all of the Government's rights to protect the public treasury against unlawful payments to contractual claimants. There can be no question that, prior to 1940, the Comptroller General could have withheld payment of a transportation bill in circumstances where he concluded, on the basis of prior rulings of the Interstate Commerce Commission, that the charges encompassed in that bill violated the Interstate Commerce Act's prohibition against unjust and unreasonable rates.

See, also, *United States* v. *Western Pacific R. Co.*, 352 U. S. at 74. Congress has now modified this power as to rates deemed unreasonable, but made it plain that this modification has no effect on the instant cases or upon any transportation performed and paid for prior to the effective date (August 26, 1958) of P. L. 85–762.[14]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
HOWARD E. SHAPIRO,
Attorneys.

JANUARY 1959.

[14] In these suits, the United States is a defendant in the carriers' actions to recover sums recaptured by the General Accounting Office after it discovered, on post-payment audit, that petitioners had been overpaid. The procedure is outlined in *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253. As a result of the amendment to Section 322 by P. L. 85-762, effective August 26, 1958, the United States will be required to collect "overpayments" of unreasonable charges from motor carriers by suing them in the district courts under 28 U. S. C. 1345. See H. Rep. No. 2346, 85th Cong., 2d Sess., p. 16. The Government retains the power to recoup, by administrative deduction from subsequent bills, the amount of "overcharges", as that term is defined by amended Section 322. But whether the United States is plaintiff or defendant, these questions subsist: (1) The right of the Government to secure redress from motor carriers for past illegal exactions; (2) the power of the Commission to consider, on reference from the courts, the underlying transportation issues.

APPENDIX

1. Section 322 of the Transportation Act of 1940, September 18, 1940, c. 722, 54 Stat. 955, 49 U. S. C. 66, provides:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

2. P. L. 85-762, 85th Cong., August 26, 1958, provides:

* * * * *

> SEC. 2. Section 322 of the Transportation Act of 1940 (49 U.S.C. 66) is amended as follows:
>
> (1) By striking the words "overpayment to" and substituting therefor the words "overcharges by".
>
> (2) By adding a new sentence at the end of the section as follows: "The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act: *Provided, however,* That such deductions shall be made within three years (not including any time of

war) from the time of payment of bills: *Provided further,* That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later."

SEC. 3. The provisions of this Act which amend the Interstate Commerce Act, as amended, shall apply only to causes of action which accrue on or after the effective date of this Act. The provision of this Act which amends section 322 of the Transportation Act of 1940 (49 U. S. C. 66) shall apply only to transportation performed and payment made therefor subsequent to the effective date of this Act.

3. The relevant provisions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, are as follows:

GENERAL DUTIES AND POWERS OF THE COMMISSION

SEC. 204. [49 U. S. C. 304]

(a) It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative

without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * *

ACTIONS FOR RECOVERY OF CHARGES; LIMITATION OF ACTIONS

SEC. 204a. (5)—[49 U. S. C. 304a. (5).]

The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

* * * * *

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 216. [49 U. S. C. 316]

* * * * *

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering prop-

erty for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect

whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged,

and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatsoever.

* * * * * *

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.